



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

HIGH COURT REF NO: 326/2021

REVIEW CASE NO.: 25/290/2021

MAGISTRATE'S SERIAL NO.: 55/2021

In the matter between:

THE STATE

v

BRINSKY LEROY MACKAY

Accused

JUDGMENT DELIVERED: TUESDAY, 22 FEBRUARY 2022

Nziweni AJ:

Introduction

[1] This matter was referred to this court on automatic review in terms of section 302 (1) of the Criminal Procedure Act, 51 of 1977, ("the Act"), by the Cape Town Magistrate's Court.

[2] Mr Brinsky (the accused) who was not legally represented, was charged with a crime of attempted housebreaking with intent to commit a crime unknown to the State.

I paraphrase the allegations of the state in the charge sheet. It was alleged that the accused unlawfully and intentionally attempted to break open and enter the door and window of the complainant's residence, with the intent to commit a crime unknown to the State.

[3] The accused pleaded guilty to the charge that was put to him. The magistrate proceeded to question him in terms of the provisions of section 112 (1) (b) of the Act. Pursuant to the magistrate being satisfied that the accused pleaded guilty, he was duly convicted on the strength of his guilty plea. Thereafter, he was sentenced to a period of one (1) year imprisonment.

[4] When the matter came before me on review on 09 September 2021, I directed the following query to the magistrate:

1. Do the answers given by the accused disclose a crime? Which act in the actions of the accused, constituted a crime of attempted house breaking with intent to commit a crime unknown to the state?
 - 1.1 The accused stated that he wanted to break the window but he did not break it.
 - 1.2 He then went to the gate and threw a brick under it and the gate did not open.
 - 1.3 The statement of the accused does not pertinently reveal which gate he is referring to.
 - 1.4 It is thus not clear from the record which gate the accused is referring to or whether the gate referred to, forms part of a structure of a building.

1.5 Furthermore, the accused's statement simply states that he threw the brick under the gate; whether the brick did in fact strike the gate, it is not clear from the answers proffered by the accused.

2. Though the accused verbalised his intentions, the critical question which still begs is whether there is enough facts to show that steps were taken to carry out the intention.
3. In the circumstances, was the court not supposed to have recorded a plea of not guilty?
4. Lastly, the verdict on the J15 only indicates that the accused was found guilty. Surely, a person who purports to plead guilty, and discloses his intention voluntarily; cannot be found guilty of attempted housebreaking with intent to commit a crime unknown to the prosecutor. Particularly if the provisions of section 262 (3) of the Criminal Procedure Act, 51 of 1977 ("the Act"), are taken into account.

4.1 The question which aptly arises is, whether the verdict is correct under the circumstances. Was the court not supposed to have entered a qualified verdict?

5. If the Magistrate agrees with the queries or concerns which I have raised; should the proceedings be set aside altogether or should the matter be referred back in order for the court to enter a plea of not guilty, in terms of section 113?
6. The magistrate is requested to address this query as a matter of urgency.

Magistrate's response

[5] In answering the query, the magistrate responded by conceding to all the aspects of the query, and requested that the verdict and the sentence be set aside. Pursuant to the concession made by the magistrate, I ordered for the immediate release of the accused from the correctional centre and I indicated that the reasons for the order would follow in due course. These are the reasons.

[6] The concession by the magistrate is rightly made; for the following reasons:

What constitutes the offence of attempted 'house breaking'?

[7] Even if an accused person pleads guilty to a charge of attempted 'housebreaking with intent to commit a crime unknown to the prosecutor', for the accused to be convicted of an offence, the questioning in terms of s 112 (1) (b) of the Act, must prove beyond a reasonable doubt that the accused committed the specified offence.

[8] The record of the proceedings reflects the following:

Magistrate's question: "What led to you being arrested?"

Accused: "I was walking down the road pass 2 Robin Road. I saw something valuable in the window. I took a stone, as I wanted to break the window and grab the stuff through the window. I did however not break the window. I then went to the gate, stood at the gate, I threw the brick under the gate but could not open the gate. It was my intention to break in and steal something of value I had no permission to act the way I did. I knew it was wrong and I knew my actions were punishable by law. The next day as I was walking begging for food, security then asked me to give my co-operation as there was a complainant against me. I was arrested and taken to SAPS. The charges were explained to me at SAPS and my rights were read out. I admit that I attempted to break into the house and steal something."

[9] After this answer from the accused, the magistrate stated that she is satisfied that the accused is guilty of the offence.

[10] The accused's answer, given to the question posed in accordance with s 112 (1) (b) of the Act; does not sufficiently articulate clearly and beyond reasonable doubt, the accused's intent to commit the offence he is charged with. For instance, the answer given to the magistrate does not reveal that the accused attempted to enter into a structure or a house by removing or displacing, or breaking, or opening anything that was intended to close or to cover the access to a property.

[11] Importantly, it is not clear as to whether the gate the accused is referring to, formed part of a structure of a building or a house. Furthermore, the condition of the place where the accused intended to 'break in' is not even explicit, from the explanation of the accused. The explanation of the accused merely reveals that he was walking down the road, passed 2 Robin Road and he saw something in the window, he took a stone to throw at the window and he did not throw the stone at the window. He went to the gate and threw the stone under the gate.

[12] The questions raised in this matter are not novel. The jurisprudence around what constitutes the offence of 'attempted housebreaking with intent to commit a specified offence' is quite established.

[13] In accordance with the well-established principles set out by the Courts, the offence of 'house breaking' has an essential element or ingredient, which is the removal of an obstacle of a building or structure or any part thereof.

[14] In *Bam v S* 2020 (2) SACR 584 (WCC) (20 July 2020) at paragraphs 25-26, the following is stated:

"Thus, the crime is charged as one of housebreaking with intent to commit a specific offence, or in the event that the offence is unknown to the prosecutor, the accused may be charged in such terms.

26. The essential and accepted elements of the crime as it is known in our law are i) the 'breaking' of the premises -in a legal as opposed to a physical sense ie by the displacement of any obstruction to entry which forms part of the premises (such as a door or window) by opening, breaking or (re)moving it ii) entry into the premises- either completely or by means of any part of the person or via an instrument (thus the insertion of a part of the body such as a hand or even a tool which is used to effect the break-in will suffice) iii) wrongfulness ie an unlawful break-in and entry without lawful authority such as consent, an order of court or a search warrant and iv) the necessary criminal intent ie the intent to commit an offence."

In the case of *S v Hlongwane* 1992 (2) SACR 484, at 485-G, (N), the following was stated:

". . . On the other hand I do not think it is necessary that an actual breaking occur before a conviction of an attempted housebreaking would be warranted. If the conduct of an accused person consist in both a breaking and an entry with the requisite intent, the charge against him should be one of housebreaking and not of an attempt thereto. If, as suggested by the learned author, the accused is guilty of a 'breaking' but not of obtaining entry into the premises, he will probably be guilty of an attempt, if of course, the relevant intent has been proved."

[15] In the present matter, the accused made his intention known to the court that at the critical time, he wanted to commit an offence of housebreaking. However, the conduct or the method used in attempting to gain access or entry into the premises is not clear. In this instance, had it been made clear that at the critical time that the

accused threw the stone, and he did that at the gate which formed part of the structure he intended to break into; it would be something completely different.

[16] In the context of this case, the throwing of the stone under an indeterminate gate leads to ambiguity. Consequently, the act of throwing a stone under an unspecified gate does not mean that the accused took a step in furtherance of his attempt to break into a locked structure, but ultimately failed. The location of the place where attempts of forced entry were made is very significant. Hence, the act of throwing the stone without further elaboration is not sufficient to constitute an attempt of housebreaking.

[17] In the absence of evidence to show that he attempted to enter a structure or a building with intent to commit an offence therein; there is no sufficient evidence to prove that he undertook an action towards the commission or completion of the crime he was charged with, but ultimately failed.

[18] Notwithstanding the reasons set out above and for the sake of completeness, I deem it necessary to deal with the provisions of s 262 (3) of the Act.

The applicability of s 262 (3) of the Act

[19] The second question which is also of particular importance in this matter and needs to be addressed is:

'was it competent for the magistrate to convict the accused of attempted housebreaking with intent to commit an offence unknown to the prosecutor even though; the accused expressly admitted during his questioning under s 112 (1) (b) of the Act, that he intended to break into the property in order to commit a specified offence of theft.'

[20] The element concerning the intention of the accused in this matter was a known fact. The accused, during his questioning in terms of s112 (1) (b) of the Act, admitted and made his intention clear that he wanted to break into the premises to steal something valuable. Therefore, he admitted that he intended to bring about a specific consequence or that he has acted with a specific intent. The facts of the present matter reveal that there is direct evidence to the effect that the purpose of the accused's action was to steal. The answers given by the accused in this matter, clearly disclosed his subjective state of mind or intention.

[21] Section 262 (3) of the Act, states that when there is a degree of certainty that an accused intended to perform a certain act upon breaking in, he should be found guilty for intending to commit the disclosed offence. The provision reads as follows:

" (3) If the evidence on a charge of attempted housebreaking with intent to commit an offence specified in the charge, or attempted housebreaking with intent to commit an offence to the prosecutor unknown, whether the charge is brought under a statute or the common law, does not prove the offence of attempted housebreaking with intent to commit the offence so specified, or attempted housebreaking with intent to commit an offence to the prosecutor unknown, but the offence of malicious injury to property, the accused may be found guilty of the offence so proved.."

[22] In the present case, if the other elements of the offence of attempted housebreaking were proven beyond reasonable doubt, then the accused should have been found guilty of attempted housebreaking with the intent to steal, in terms of section 262 (3) of the Act. The court should have given a qualified verdict; instead of finding the accused guilty as charged in the charge sheet.

[23] It appears to me, therefore, that in this context, it is also worth noting that the accused should also be warned about the applicability of s 262 (3) of the Act, before the commencement of the questioning in terms of s 112 (1) (b) of the Act.

[24] For the reasons set out above, it was clear that the conviction and the sentence imposed upon the accused had to be set aside. Given the fact that the accused already served considerable time at the correctional centre toward his sentence, I hold the view that in the context of this case, it would be unjust to have him prosecuted for the very same offence again.


Nziweni, AJ

I agree, and it is so ordered


Lekhuleni, J